83-920

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

VINCENT GAMBALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the trial court's preclusion of defense evidence and effective preclusion of presentation of the defense theory of the case violated defendant's Sixth Amendment rights.

2. Whether defendant was denied a fair trial by the prosecutor's improper rebuttal summation which speculated on matters not properly in evidence at a time when defendant had no further opportunity to respond.

3. Whether the Government's use of sonically enhanced and filtered tape copies violated the best evidence rule.

4. Whether the trial court improperly imposed cumulative penalties under 18 U.S.C. Secs. 659 and 2113(b) for a single criminal transaction.

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VINCENT GAMBALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vincent Gambale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Kearse, Cardamone and Winter, JJ.) (App., *infra*, pp. 1a-4a) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 6, 1983. A timely petition for rehearing was denied on October 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

Constitutional Provisions, Statutes and Rules Involved

Sixth Amendment to the Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 659. Interstate or Foreign Shipments by Carrier.

> Whoever embezzles, steals or unlawfully takes by any fraudulent device * * * from any railroad . . . vehicle . . . vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce . . . any money, baggage, goods, or chattels, . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *

18 U.S.C. § 2113. Bank Robbery and Incidental Crimes.

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both;

Federal Rules of Criminal Procedure.

Rule 29.1. Closing Argument

After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.

Federal Rules of Evidence.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Statement of the Case

Petitioner was convicted in the United States District Court for the Eastern District of New York (Bramwell, J.), after trial by jury, of conspiracy to commit bank theft and theft from interstate shipment (18 U.S.C. § 371); theft from an interstate shipment (18 U.S.C. § 659); and bank theft (18 U.S.C. § 2113(b)). He was sentenced to consecutive terms aggregating twenty-five years imprisonment and a cumulative fine of $20,000. The conviction was affirmed by the United States Court of Appeals (App., *infra*, 1a-4a).

The Government's Proof at Trial

The indictment in this case was based upon the theft of a two million dollar shipment of currency en route from the Republic National Bank in New York to Seoul, Korea. According to Steven Mui, the Government's principal witness, the money was stolen from an armored car transporting it to John F. Kennedy Airport by substituting bogus bags filled with newspaper for the real money. Mui

and co-defendant Frank Marrale were employees of the Armored Express Company which was entrusted with delivery of the shipment to Korean Airlines on November 10, 1981.*

In April 1981, Mui was employed as a truck courier for Armored Express Company (Tr. 194). His duties included taking large amounts of currency from New York banks to Kennedy Airport for shipment to foreign banks (Tr. 202). He and Frank Marrale routinely made overtime runs to Japan Airlines and Korean Airlines (Tr. 206-12). They would personally deliver the bags of money and paperwork for the shipment to the pilot of the aircraft and obtain a receipt (Tr. 213).

Mui observed that the pilots regularly failed to compare the serial numbers on the bags of currency against the accompanying paperwork; rather, the pilot merely would sign for the shipment (Tr. 212). He and Marrale began to discuss stealing a shipment by substituting phony bags for the real bags of money (Tr. 213). Marrale told him that he knew three individuals who would prepare the phony bags and seals**; Mui was supposed to switch the bags and put the destination tags prepared by the bank on the bogus bags (Tr. 216).

On November 10, 1981, Mui was informed that there was an overtime run consisting of two million dollars to Korean Airlines and seven million dollars to Japan Airlines, to be delivered to Kennedy Airport by 1:00 A.M. on November 11, 1981 (Tr. 302). Marrale told him they were going to take the Korean shipment that night, stating he would telephone his third partner and instruct him to bring

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* Frank Marrale and his son Alphonse were charged along with Petitioner on the instant indictment but were severed prior to trial. Their convictions were separately affirmed by the Court of Appeals. *United States* v. *Marrale*, 695 F.2d 658 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1435 (1983).

** Mui never met Marrale's three partners and did not know who they were (Tr. 219-20, 274-76).

the phony money in a car and to park the vehicle on West Street in front of Armored Express (Tr. 303).*

Mui and Marrale completed their early evening run at approximately 11:50 P.M. They returned to Armored Express, stopped beside a Lincoln Continental, Marrale removed five bags from its trunk and placed them behind the driver's seat of the armored truck (Tr. 318). They then drove to Armored Express where they picked up the two shipments and the necessary paperwork (Tr. 319). The five bags containing the Korean Airlines shipment were placed in front of the driver's seat (Tr. 320), the destination tags were removed from the authentic bags of money, attached to the bogus bags, whereupon the truck proceeded to Kennedy Airport, where the switch was made (Tr. 329-31).

Upon their return from the airport, Marrale gave Mui keys to his Cougar automobile, telling him to unload the bags of money hidden behind the driver's seat of the armored truck and to put them in the trunk of the Cougar (Tr. 334). After doing this, Mui noticed the Lincoln Continental from which Marrale had earlier taken the bogus bags parked in approximately the same location. He also noticed a white male, approximately six feet tall and one hundred ninety pounds, got into the Lincoln (Tr. 339). Mui, however, was unable to identify this individual.

Several days after the theft, officials of Armored Express asked Mui to take a lie detector test (Tr. 353). Mui spoke with an attorney about his participation in the theft and agreed to cooperate with the Government in return for transactional immunity (Tr. 356). The Government

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* Significantly, the Court of Appeals carried over into its opinion a misstatement by the Government in its brief to the effect that Marrale's other partner was somehow involved with rugs. The record contained no such reference whatever. This was of crucial significance since Petitioner owned a rug store and the Government's theory of the case was that he was the unidentified third partner.

introduced a number of consensual tape recordings between Mui and Marrale from December 4th to December 9th 1981, with respect to disposal of the money and Mui's receiving his share of the proceeds.*

Marrale delivered approximately $300,000 to Mui on December 6, 1981 at the Kings Plaza Shopping Mall in Brooklyn (Tr. 380). Mui handed Marrale the keys to his car, Marrale went outside to the parking lot and came back ten minutes later, telling him that he had placed a shopping bag with $300,00 in the trunk of his car (Tr. 382). Mui then walked outside to the parking lot and saw the same Lincoln Continental he had seen on the night of the theft (Tr. 383). He identified Petitioner Vincent Gambale as having been behind the wheel in the parking lot (Tr. 394). Mui admitted, however, that he never met Gambale, never spoke to him and merely saw him in the parking lot on the afternoon of December 6 (Tr. 470).

FBI agents testified to having participated in the surveillance at the Kings Plaza Shopping Center (Tr. 828). Marrale and Mui were observed in conversation inside the mall (Tr. 833). After 5-10 minutes, Marrale left the mall and entered the Lincoln (Tr. 834-35). Marrale thereafter exited the vehicle, walked over to Mui's car, opened the trunk and placed a brown shopping bag inside (Tr. 837-38). Marrale then re-entered the shopping center (Tr. 840). He spoke to Mui again and Mui left (Tr. 841). Marrale exited the shopping center, walked to Gambale's car and the two drove off (Tr. 844). Significantly, none of the surveillance agents ever saw Vincent Gambale carrying the shopping bag (Tr. 650-60, 754, 759, 837-40, 858-59). It was Frank Marrale who was observed making the transfer in the parking lot (Tr. 837-39).

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* Among them was a tape on which the Government alleged that Marrale mentioned the name "Vinnie". See Point III, *infra*.

The Defense Case

Marshall Gaither, Special Agent of the FBI, testified that Steve Mui had told him that the unidentified man he saw on the night of November 10 was "losing his hair" and that he described the man in his 302 report as a "balding white male" (Tr. 886, 888, 890).* The agent was on surveillance in the Kings Plaza parking lot (Tr. 895). He observed Marrale place the shopping bag in Mui's car trunk but didn't see Gambale give the bag to Marrale (Tr. 895-96).

Joan Marrale—Frank Marrale's wife—testified that on November 9, 1981—the day before the theft—her husband had borrowed Gambale's red Lincoln and used it until November 11, 1981—the day after the theft (Tr. 947-48). Her husband borrowed the car because his car had broken down the previous weekend (Tr. 947). She and her husband had borrowed Gambale's car many times in the past and had even taken it on a trip to Wyoming in 1979 (Tr. 945-46).

Anna Mae Gambale—defendant's wife—testified that Marrale borrowed their car on November 9, 1981 and that she, in fact, turned over the car keys to him (Tr. 975-77, 980). Marrale returned the car on November 11, 1981 (Tr. 977). He had borrowed the car many times in the past (Tr. 975).

Robert Gagliardotto—a trucker and a friend of Marrale—testified that he had Marrale's Cougar automobile towed into his warehouse for repairs on November 9, 1981 (Tr. 1286-87; 1293). On the following afternoon—November 10 (the day of the theft)—he returned Marrale's repaired car to a parking space on West Street, near the vicinity of the Armored Express office, at about 4:30 to 5:30 p.m. (Tr. 1288, 1294, 1298). The following day—November 11—he

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* Significantly, in the course of his trial testimony, the defendant specifically exhibited his hair and hairline to the jury (Tr. 1063-64). It was hardly that of a "balding" man "losing his hair." (*Cf.* Tr. 888-90).

had to have the car towed in once again for further repairs (Tr. 1294-98).

Vincent Gambale testified in his own defense (Tr. 1037-1279). He testified to having been friends with Frank Marrale for fifteen years (Tr. 1037-40). He had loaned his car to Marrale on many occasions over the years, including Marrale's trip to Wyoming in 1979 (Tr. 1042). Another of these occasions was Monday, November 9—the day before the theft—when Marrale came over and borrowed the car because his own vehicle had broken down over the weekend (Tr. 1043-44).

On Sunday, December 6, 1981, Marrale came over to his house in the early afternoon to visit (Tr. 1046). After a few minutes, Marrale asked him if he would mind giving him a lift so that he could make a phone call (Tr. 1048). Despite Gambale's offer to have him use the phone at home, Marrale declined, stating that he wanted to use a pay phone (Tr. 1048). He drove Marrale to a phone booth two blocks away (Tr. 1048). When Marrale made his phone call, he (Gambale) stayed in the car with the window up and the heat on (Tr. 1050). Gambale could not overhear any of the phone conversation at the pay phone (Tr. 1051).

At about 2:30 that afternoon, he drove to New York with one of his employees, Robert Ruckert, to pick up some folding chairs at the Bowery Chair Factory on Canal Street (Tr. 1052-53). They delivered the chairs to the Dinettes R Us store at Coney Island Avenue and Avenue P (Tr. 1054). He finally returned home at about 3:30 or quarter to four, after having had to go back to the store to get paid for the delivery (Tr. 1055-56).*

When he returned home, he found Marrale waiting for him (Tr. 1058). He tried to beg off taking Marrale to the shopping center—he had a chronic back condition which

* Gambale's testimony as to the trip was corroborated by Ruckert (Tr. 925-29, 934).

he twisted in carrying the chairs earlier—but Marrale insisted (Tr. 1058-59). Reluctantly, he agreed (Tr. 1058, 1062). Gambale testified that Marrale appeared "a little nervous" and not "his usual self" but that at the time he never gave it a second thought (Tr. 1061-62).

Once arrived in the parking lot, Marrale got out and went into the mall without the package (Tr. 1072-73). Ten to fifteen minutes later, Marrale returned, got in the car and they parked the car at a second spot closer to the mall (Tr. 1073-74). Marrale then exited the car a second time —this time with the shopping bag from behind his seat— and walked towards another car parked in the lot (Tr. 1075). Marrale returned in about five or ten minutes (Tr. 1076). He no longer had the shopping bag and was very nervous (Tr. 1077).

As they left the parking lot, Marrale became very "fidgety" and was continuously looking around (Tr. 1077-78). When he stopped the car part of the way home to check on possible tire problems, Marrale said "Oh, shit, they are following us" (Tr. 1079). When he asked Marrale what he meant, Marrale replied that he was in debt to shylocks and suggested they were after him (Tr. 1079-80). After that he did engage in evasive driving on the way home, at Marrale's request (Tr. 1080). However, he had no idea that he was being followed by the F.B.I. (Tr. 1080).*

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* The trial court refused to allow Gambale to testify to the fact that at the time he was arrested his hair was pulled by the agents in an attempt to determine whether he was the "balding man" seen on the night of November 10 (Tr. 1088-90). The trial court similarly refused to allow defense witnesses Fred Calabrese, James Williams and Robert Ruckert testify to this incident (Tr. 902-3, 904-8, 910-13, 926). The crucial significance of this defense testimony—as well as the excluded testimony of defense witness George Shaw (Tr. 1307, 1310-13, 1320-28)—to the defense theory of the case is discussed in Point I, *infra*.

POINT I

The Trial Court's Refusal to Permit Petitioner to Present an Alternate Theory of Defense Constituted a Denial of His Sixth Amendment Rights.

The Government's case against Petitioner was built on the theory that he was the unnamed "partner" responsible for laundering the proceedings of the armored truck theft. In accordance with this theory, the Government introduced evidence that he was present in the shopping center parking lot on the afternoon of the payoff to Steven Mui (December 6th) and that his car was parked in the vicinity of the armored truck offices on the night of the theft (November 10th). Moreover, it introduced co-conspirator statements made by Frank Marrale to the effect that this "partner" was going to be in the vicinity of the armored truck office on the night of the theft and would be in the parking lot surveilling Mui on the day of the payoff.

The evidence that surfaced at trial, however, was distinctly at variance with the Government's theory. While Mui identified Gambale as having been in the shopping center parking lot on the afternoon of the exchange—a fact which Gambale did not contest—he identified a wholly different man, a man "losing his hair" whom the F.B.I. described in its 302 report as a "balding white male," as having been present on the night of the robbery.

More importantly, at the time he was arrested—on December 10—Gambale's physical appearance was so different from that of the alleged "partner" present on the night of November 10 that the F.B.I. agents pulled his hair and, seeing that it wouldn't come off, said "oh shit, we got the wrong guy." (Tr. 902-3).

Petitioner sought to introduce the testimony of three witnesses—Fred Calabrese, James Williams and Robert Ruckert—all of whom were present at the time he was arrested and who would have testified both to his physical

appearance as well as to the FBI agents having stated that they thought they had the wrong man (Tr. 902-3, 904-8, 910-13, 926). The trial court, however, refused to allow the defense to explore this line of inquiry when the defendant took the witness stand (Tr. 1088-90) and forbid the defense from presenting any such exculpatory evidence in the defense case in chief (Tr. 902-13).

Gambale clearly had a right to establish that an individual other than himself was involved in the specific transactions charged against him and to present such conflicting evidence to the jury for its ultimate resolution. The trial court's improper restrictions upon Gambale's presentation of such exculpatory evidence tending to establish that someone other than himself committed the acts—and that the FBI thought that it had arrested the wrong man—was clear error. *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Welcome* v. *Vincent*, 549 F.2d 853 (2d Cir. 1977).

The Right to Present a Defense

The refusal of the trial court to allow the jury to hear testimony regarding whether the FBI believed it had arrested the wrong man because of the difference in his physical description from the third "partner" deprived Gambale of his right to compulsory process and due process of law. The compulsory process clause was specifically designed to give a criminal defendant commensurate power with the government to place evidence before the jury. The Supreme Court has expounded this principle in *United States* v. *Nixon*, 418 U.S. 683 (1974), and it is now clear that the compulsory process and due process clauses afford an accused the right to discover witnesses in his favor, to produce them in court, to introduce their statements into evidence and to have them believed. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harvard L. Rev. 567 (1978). See also, *Chambers* v. *Mississippi*, *supra*, 410 U.S. at 302 ("Few rights are more fundamental than that of

an accused to present witnesses in his own defense"); *Cool* v. *United States*, 409 U.S. 100 (1972); *Webb* v. *Texas*, 409 U.S. 95 (1972).

Washington v. *Texas*, 388 U.S. 14 (1966) recognized the similarities between compulsory process and confrontation by drawing an explicit parallel between a defendant's right to elicit testimony from his own witnesses (compulsory process) and his correlative right to elicit testimony from the witnesses against him (confrontation):

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. *Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.*" 388 U.S. at 18.

See also, United States v. *Robinson*, 544 F.2d 110 (2d Cir. 1976):

> "It was entirely proper for Robinson to disprove the government's contentions by proving that the third man was someone else. 1 J. Wigmore, Evidence Section 34 (3d ed. 1940) . . . 2 Wigmore Section 413. If it was, then obviously Robinson was innocent. Evidence to the effect that the third man in the bank resembled an individual suspected of two armed robberies that occurred in the Bridgeport area within six days was clearly probative of the issue Robinson sought to prove, namely, that the third man was someone else." 544 F.2d at 112-113.

The parallel to this case is striking. Gambale sought to elicit testimony that clearly would have established a colorable question as to whether he was present on the night of the bank theft and, perforce, whether he was the third

"partner" Marrale spoke of. Indeed, it was a crucial question for Gambale as to whom the jury decided was the partner. Deprived of the knowledge that even the FBI thought they had the "wrong guy" because of the disparity in physical appearance—the jury could draw no other inference but that the "partner" was Gambale.

The two-pronged standard by which a defendant's proffered exculpatory evidence must be judged are materiality and relevance. While it is true that a witness may be excluded whose testimony is merely cumulative (*United States* v. *Rosa*, 493 F.2d 1191 (2d Cir. 1974)), vague as to content (*United States* v. *Wyler*, 487 F.2d 170 (2d Cir. 1973)), or irrelevant to an adequate defense (*United States* v. *Romano*, 482 F.2d 1183 (5th Cir. 1973); *United States* v. *Taylor*, 562 F.2d 1345 (2d Cir. 1977)), to the extent that a witness' testimony creates a significant question of fact which would impeach the Government's case, he is deemed material and favorable to the accused. *Wardius* v. *Oregon*, 412 U.S. 470 (1973); *Chambers* v. *Mississippi, supra*. Moreover, the "burden of demonstrating that the evidence was of a favorable nature is . . . a very slight one." *Evans* v. *Janing*, 489 F.2d 470, 476 (8th Cir. 1973).

The standard for review of the exclusion of such exculpatory evidence from the jury entails evaluating the possibility that the evidence, once admitted, "could . . . in any reasonable likelihood have affected the judgment of the jury," *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Johnson* v. *Brewer*, 521 F.2d 556, 563 (8th Cir. 1975); *Flores* v. *Estelle*, 492 F.2d 711, 713 (5th Cir. 1974).

It makes no difference how the exculpatory evidence is excluded—by impeachment of prosecution witnesses, by barring a defendant from impeaching his own witnesses or by denying him the right to call witnesses. The sole question is whether the suppressed evidence is material. See, *Welcome* v. *Vincent, supra*, 549 F.2d at 857 (Oakes, J.) ("a significant restriction on a defendant's examina-

tion of a witness . . . is alone enough to deny a defendant a fair trial" if the ruling operates to exclude evidence "which, if true, would have exonerated [him]"); *United States* v. *Goodlow*, 500 F.2d 954, 958 (8th Cir. 1974) (exclusion of exculpatory hearsay alone was enough to deny fair trial "because we cannot say beyond a reasonable doubt that the excluded evidence would not have changed the jury's verdict"). *See also*, Westen, *Confrontation and Compulsory Process, supra*, 91 Harvard L. Rev. at 579-581, 590-593, 608 n. 12.

The rejection of defense efforts to affirmatively demonstrate the unreliability of the Government's case and the existence of clearly exculpatory evidence withheld from the jury evidence necessary to a discriminating appraisal of reasonable doubt as to Gambale's guilt. The impingment upon Gambale's right to present his version of the facts denied him the right to a fair opportunity to defend against the Government's accusations. *Chambers* v. *Mississippi, supra; Washington* v. *Texas, supra.* Such denial amounts to a deprivation of due process of law.

POINT II

The Prosecution's Improper Rebuttal Summation and the Trial Court's Failure to Give a Curative Instruction Deprived Petitioner of a Fair Trial.

The conduct of the Government during the course of its rebuttal summation in this case went well beyond the bounds of tolerable excess. In what amounted to an attempt to sandbag the defense, the prosecution withheld until its rebuttal summation a powerful, though misleading, jury argument on a crucial issue in this case—the question of Gambale's trip to New York to pick up chairs before going to the Kings Plaza Shopping Center with Marrale (Tr. 1435-38). The argument, conceded by the trial court to be "bad faith" and based on "testimony not being in the record in this case" (Tr. 1444-46), was im-

proper rebuttal summation in violation of the letter and purpose of Rule 29.1 of the Federal Rules of Criminal Procedure. The trial court's refusal to grant a mistrial and failure to give the jury a curative instruction deprived Gambale of a fair trial.

The defense presented powerful evidence indicating that, in the middle of the afternoon on which he was supposed to exchange a $300,000 payoff, Gambale had taken a trip to New York with one of his store employees to pick up and deliver some folding chairs to a store in Brooklyn in order to make $40 for himself during the Christmas season—hardly the actions of a man who stood to be profiting handsomely from a $2,000,000 bank theft. This wholly unrelated trip substantially supported Gambale's testimony that he was merely going about his personal business, and that, after returning from New York, he merely gave Marrale a lift to the shopping center as a favor to a friend —wholly unaware of what Marrale was up to.

Recognizing its lack of evidence explaining the significance of Gambale's unrelated trip to New York ostensibly in the middle of the transaction, the prosecution in its rebuttal summation unearthed the following explanation for the first time in the trial:

> What was the trip with the chairs all about? Why this pickup of chairs for $40 when he is cashing in on a $2,000,000 ripoff? Ladies and gentlemen, you don't know, I submit to you, whether the only reason Mr. Gambale went out on that day to the Bowery Chair Factory was to pick up chairs.
>
> • • •
>
> What is happening during the course of that trip is Mr. Gambale is going to pick up the laundered money to deliver the money later that afternoon. That trip had nothing to do with a $40 payment, I submit to you. Tr. 1435-36.

This disingenuous argument, however, was totally wide of the mark. As the prosecutor well knew, surveillance reports of Gambale's trip that day corroborated that he made the trip exactly as he testified and that there was no indication in the report—or anywhere in the evidence at trial—that Gambale picked up anything even remotely akin to the laundered money alluded to in the prosecutor's rebuttal (Tr. 1445).*

Rule 29.1 of the Federal Rules of Criminal Procedure, proposed by the Supreme Court and adopted by Congress without change in 1975, was specifically intended to eliminate from federal criminal trials the unfairness to a defendant created by the lack of an opportunity to address the jury on arguments raised by the prosecutor in summation.

The underlying purpose of the Rule was specified in the 1975 House Judiciary Committee Report (H.R. Report No. 94-247):

> "The Committee believes that . . . fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply."

New arguments by the prosecution "in behalf of conviction" are obviously improper in rebuttal. As the District of Columbia Circuit succinctly wrote in commenting on the proper scope of rebuttal:

> ". . . Government counsel should not be allowed to develop new arguments on rebuttal . . ." *Moore* v. *United States*, 344 F.2d 558, 560 (D.C. Cir. 1965) (per curiam).

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* Indeed, the trial judge conceded that there was no evidence in the record to support the prosecutor's rank speculation (Tr. 1446).

Here, the prosecutor's rebuttal argument was a particularly egregious violation of Rule 29.1. Not only was the prosecutor's reference a "new argument" but it was, as even the trial judge admitted (Tr. 1446), wholly unsupported by any evidence in the record. *Cf. United States* v. *Gonzalez*, 488 F.2d 833, 836 (2d Cir. 1973). Nonetheless, the prosecutor invited the jury to speculate on matters plainly not part of the record in this case. Occurring as it did at a point in time when the defense had no further opportunity to respond, its effect on the jury had to be particularly pernicious.

The law is well-settled that an improper and prejudicial summation by a prosecutor requires reversal unless the error is cured by prompt cautionary instructions from the trial judge. See, e.g., *United States* v. *Guglielmini*, 384 F.2d 602, 606 (2d Cir. 1967). And in an "extremely close" case such as the one at bar it is the duty of the trial judge to "intercede sua sponte in order to caution the jury to ignore the prosecutor's remarks." *United States* v. *Agueci*, 310 F.2d 817, 837 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

This failure to properly instruct the jury or give the defense an opportunity to respond thus virtually insured that the particular prejudice Rule 29.1 was designed to avoid—the lack of opportunity for the defense to answer a prosecution argument made "in behalf of conviction"—would work to Petitioner's disadvantage.

POINT III

The Government's Use of Sonically Enhanced and Filtered Tape Copies Violated the Best Evidence Rule.

At trial in this case, the Government played a tape recording of a telephone conversation between Marrale and Mui on the afternoon of December 6 relative to the meeting at the Kings Plaza Shopping Center later that afternoon (Tr. 367-68, 374). The Government sought to play this tape before the jury because it alleged that contained on the tape was the phrase, "Hold on a minute. Pause. Yo, Vinnie. Unintelligible. 400. Unintelligible. In the parking lot" (Tr. 235).

The Government, however, chose not to play the original tape to the jury. Rather, it played a specially prepared "sonically enhanced" and filtered version of the tape on which the crucial phrase—which was all but unintelligible on the original tape—was mechanically boosted in volume and filtered so as to highlight the crucial portion on the tape.

Counsel objected to the admission of this "specially enhanced" version of the tape, questioning both the authenticity of the duplicate as well as the audibility of both tapes, arguing that under the "best evidence" rule, only the original tape should be utilized (Tr. 247-59, 369-73).* The trial court over-ruled defense objections and permitted the sonically enhanced duplicate to be played, making no inquiry into how the duplicate was prepared (Tr. 256), despite counsel's objections as to authenticity (Tr. 239-40, 252). This constituted fundamental error.

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* Counsel also objected to the admission of two transcripts of the contested tape which were distinctly at variance with the transcript originally admitted at the trial of Gambale's severed co-defendants in March 1982. Defendant's objections to the use of these transcripts was over-ruled, despite their disparity from the transcript utilized at the first trial. (Tr. 230-40, 252).

Under Rule 1003 of the Federal Rules of Evidence, the "best evidence" rule is stated thusly:

> "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

In the instant case, both prongs of FRE 1003 are implicated. Counsel raised colorable objections both on the grounds of authenticity and unfairness, given the disparity in the tapes (and the relevant transcripts) between the first and second trials. The trial court, accordingly, should have made far more detailed inquiry into the manner of the "enhanced" tape's preparation and, in any event, should have ruled the new tape and new transcripts inadmissible at the second trial on the grounds of unfairness.

Clearly, where authenticity is questioned the trial court has an obligation to conduct detailed inquiry into the manner in which the duplicate was prepared in order to determine whether there was a failure in the process of reproduction because of mechanical or human error.* *See, e.g., United States* v. *Alexander,* 326 F.2d 736 (4th Cir. 1964).

Similarly, in *Fountain* v. *United States,* 384 F.2d 624 (5th Cir. 1967), where several noise suppressed but concededly accurate copies of tape recordings were admitted, the court nonetheless refused to admit one recording, noting that the confused mixture of three or four voices and certain mechanical interference in the original recording made it impossible to accurately reproduce the conversation transcribed on the original. 384 F.2d at 630.

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* Here, the trial judge conducted no independent inquiry at all, merely accepting the Government's representation that the duplicate accurately reflected the original and stating that the defendant could play the original for the jury if he wished (Tr. 256-57).

See also, *United States* v. *Stephenson*, 121 F. Supp. 274, 279 (D.D.C. 1954), *appeal dismissed*, 223 F.2d 336 (D.C. Cir. 1955) (court refused to admit transcript of re-recordings which differed with each other and whose accuracy could not be determined due to hearing difficulties with the recording).

Here, counsel specifically contested the accuracy of the reproduction. Rather than merely listening to the original and the sonically enhanced version, the trial court had an obligation to conduct further inquiry into the manner of reproduction rather than merely accepting the Government's representation that it was accurate.

Under the totality of circumstances, then, it was error for the trial court to have allowed the sonically enhanced tapes before the jury. This error was compounded by the manifest unfairness of permitting the Government to substitute additional transcripts and a sonically enhanced tape in the second trial from that which was used in the first trial. Particularly in light of the fact that this tape allegedly contained the only mention of Gambale by name in the entire case, its admission into evidence hardly may be called harmless. *Cf. United States* v. *Robinson*, 707 F.2d 872, 879 (6th Cir. 1983) (submission of two versions of transcript prejudicial when tape is significantly inaudible).

Whether premised on the trial court's failure to make appropriate inquiry into the tape's accuracy under FRE 1003(1) or the inherent unfairness of utilizing new transcripts in the second trial under FRE 1003(2) fundamental error was committed.

POINT IV

Congress Did Not Intend to Subject Petitioner to the Imposition of Cumulative Penalties Under 18 U.S.C. Sec. 659 & 2113(b) for a Single Criminal Transaction.

It is axiomatic that Congress' intent to provide multiple convictions and punishments for the same acts must be clear and unambiguous. *United States* v. *DiGeronimo*, 598 F.2d 746 (2d Cir. 1979); *Bell* v. *United States*, 349 U.S. 81 (1955). Absent the requisite clear legislative directive, doubt will be resolved against fragmenting a single transaction into multiple offenses. *Ladner* v. *United States*, 358 U.S. 169 (1958).

The same analysis requires that Petitioner's conviction in this case for violating 18 U.S.C. Sec. 659 be set aside. Because that conviction rests on conduct that was fully within the scope of the bank robbery statute (18 U.S.C. Sec. 2113(b)) and because that statute sets forth a "comprehensive scheme" for punishing the conduct that it proscribes, Appellant's conviction and sentence under Sec. 2113(b) should have ended matters and precluded any separate conviction (or sentence) under another statute for the same criminal conduct.

Simply stated, the multiplicity doctrine as enunciated in *Blockburger* v. *United States*, 284 U.S. 299 (1932) is inapplicable. Various courts—including this Court—have declined blindly to apply *Blockburger* where other principles of statutory interpretation demonstrate that Congress did not intend that two statutes apply to the same conduct.

In *Simpson* v. *United States*, 435 U.S. 6 (1978), where defendants were convicted of two separate aggravated bank robberies and of using firearms to commit the robberies, in violation of 18 U.S.C. Sec . 2113(a) & (d) and 924(c), this Court held that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both Sec. 2113(d),

the aggravated robbery provision of the Federal Bank Robbery Act, and Sec. 924(c), a general enhancement provision providing additional penalties for the use of firearms in the course of commission of federal crimes:

> Cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the *Blockburger* test. That test, the Government argues, is satisfied in this litigation. *We need not reach the issue.* 435 U.S. at 11, (Emphasis added)

The Court continued:

> Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged. *Jeffers* v. *United States,* 432 U.S. 137, 155 (1977). *Id.* at 12-13.

This Court itself has acknowledged the boundaries of *Blockburger* in *Albernaz* v. *United States,* 450 U.S. 333 (1981), when it stated:

> The *Blockburger* test is a "rule of statutory construction" and because it serves as a means of discerning Congressional purpose, the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. 450 U.S. at 340.

In this case, the law is clear that the Federal Bank Robbery Act, 18 U.S.C. Section 2113, provides the exclusive remedy for conduct falling fully within its coverage. Numerous courts have so held. *United States* v. *Canty,* 469 F.2d 114 (D.C. Cir. 1972); *United States* v. *Beck,* 511

F.2d 997 (6th Cir. 1975). Petitioner, accordingly, should have been prosecuted entirely within the bank robbery statutory scheme. By venturing outside Section 2113, the government was able impermissibly to pyramid a maximum sentence of ten years imprisonment into a twenty year penalty.

Prince v. *United States*, 352 U.S. 322 (1957), one of the seminal cases on illegal pyramiding, provides a detailed analysis of the Federal Bank Robbery Act. The Supreme Court held that a bank robber cannot be convicted of both robbery and entry of a bank with intent to commit a robbery if the robbery is consummated. The Court concluded that Congress made entry itself illegal in order to reach culprits who fell short of their purpose rather than to fragment the crime for the sake of enhanced punishment.

Predictably, the government invoked *Blockburger* and its progeny. Rejecting this view, the Court stated:

> None of these [cases] is particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. 352 U.S. at 325.

Finding the legislative history of Section 2113 to be ambiguous, the Court thereupon applied the traditional rule of lenity and precluded the imposition of cumulative punishments.

The result in *Prince* stemmed primarily from the Court's recognition of the comprehensive nature of the scheme embodied in Section 2113. The statute carefully subdivides the offense of bank robbery into a continuum of discrete steps ranging from attempted entry and entry with intent to rob; to robbery and attempted robbery by force, violence, or intimidation; to robbery utilizing a dangerous weapon; to robbery resulting in death or kidnapping. The statute correspondingly provides for penalties in increasing degrees of severity in relation to the degree of aggravation of the theft. Unable to ascertain the clear and

unambiguous legislative intent which would have validated multiple punishments from the literal language of the statute itself or its sparse legislative history, the Court reversed the convictions.

Although in *Prince* both offenses fell within the scope of Section 2113, other courts have not deemed this factor to be determinative. For example, in *United States* v. *Canty, supra,* the defendant was convicted of bank robbery by force and violence under Section 2113(d) and of assault with a dangerous weapon under a catchall provision of the District of Columbia Code. By indicting in this manner, the prosecution was able to obtain a sentence longer than the maximum sentence authorized under the highest tier of the Federal Bank Robbery Act. Endorsing the doctrine of *Prince,* that Section 2113 was all-comprehensive in the bank robbery context, the *Canty* court vacated the defendant's conviction for assault in violation of the local criminal code.

Similarly, in *United States* v. *Leek,* 665 F.2d 383 (D.C. Cir. 1981), the D.C. Circuit reaffirmed the *Canty* holding:

> But we do not agree with the Government that Leek is not in position to complain. Of course, we cannot be certain that he would have received an equally lengthy sentence had he been convicted under the Federal statute alone. ***But more importantly, Leek has a right to be free of the brand of two felony convictions, for negative consequences may flow from the very fact that his record shows two convictions rather than one. When, as here, judgment could not legally have been entered on both, the accused is entitled to have his record set straight.*** Consequently, we hold that the conviction and sentencing of Leek for assault with a dangerous weapon atop entry with intent to commit bank robbery was invalid. (Emphasis added) *Id.* at 388.

Finding *Blockburger* to be irrelevant once more, the Court invoked the rule of lenity and struck down the imposi-

tion of enhanced punishment. See also, *United States* v. *Beck, supra,* where the Sixth Circuit held similarly:

> While courts have broadly construed the Hobbs Act (citations omitted) we remain unpersuaded that the Hobbs Act was designed to reach, or reaches, the extortion of bank assets, having been intended to curb labor racketeering. *See United States* v. *Franks,* 511 F.2d 25 (6th Cir. 1975). 511 F.2d at 1000.

Citing *Canty,* the court continued:

> However, we need not here consider the applicability of the Hobbs Act, since we conclude that the Hobbs Act conviction was improper because the bank theft statute, being "a comprehensive scheme for prosecuting and punishing persons who rob federally insured banks," was intended to exclusively proscribe conduct within its "coverage." 511 F.2d at 1000.

Clearly, then, the cumulative sentences imposed on Vincent Gambale for conduct that was fully within the scope of the bank robbery statute—which sets forth a "comprehensive scheme" for punishing the conduct proscribed—warrants vacatur of his sentence under 18 U.S.C. Section 659.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 2, 1983

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the sixth day of September, one thousand nine hundred and eighty-three.

Present:

HONORABLE AMALYA L. KEARSE,
HONORABLE RICHARD J. CARDAMONE,
HONORABLE RALPH K. WINTER,
Circuit Judges.

No. 83-1109

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VINCENT GAMBALE,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Opinion of the Court of Appeals

Defendant Vincent Gambale appeals from a judgment entered in the United States District Court for the Eastern District of New York, after a trial before Henry Bramwell, *Judge*, and a jury, convicting him of bank theft, in violation of 18 U.S.C. § 2113(b), theft from an interstate shipment, in violation of 18 U.S.C. § 659, and conspiring to commit such theft, in violation of 18 U.S.C. § 371. Gambale was sentenced to ten years' imprisonment and a $5000 fine on the bank theft count, ten years' imprisonment and a $5000 fine on the interstate shipment theft count, and five years' imprisonment and a $10,000 fine on the conspiracy count, the jail terms to be served consecutively and the fines to be cumulative. On appeal, Gambale makes a number of challenges to his conviction. We find merit in one.

Gambale contends that the nonhearsay evidence at trial was insufficient to connect him with the conspiracy in order to allow coconspirator statements into evidence against him, *see United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969), and that the evidence as a whole was insufficient to convict him. We reject both contentions. Gambale does not dispute that a conspiracy existed, to which one Frank Marrale was a party. The nonhearsay evidence as to Gambale's participation in that conspiracy included the testimony of accomplice-witness Steven Mui as to the repeated involvement of Gambale's car in the preparation for the theft and the distribution of the proceeds of the theft; Mui's observation of a person of Gambale's description following Mui and Marrale after the theft; and law enforcement agents' observation of Gambale's driving Marrale from Gambale's house to a telephone booth from which Marrale arranged to meet Mui to deliver part of Mui's share of the stolen money to him, of Gambale's evasive driving to and from the later meeting with Mui, and of Marrale's delivery to Mui of a bag of money after Marrale had entered Gambale's car empty-handed. The district court correctly ruled that the government had shown Gambale's participation in the

conspiracy by a fair preponderance of the nonhearsay evidence. *See United States* v. *Mejias*, 552 F.2d 435, 445 (2d Cir.), *cert. denied*, 434 U.S. 847 (1977); *United States* v. *Stanchich*, 550 F.2d 1294, 1297-1300 (2d Cir. 1977); *United States* v. *Geaney, supra.* Other evidence at trial included Mui's testimony as to Marrale's statements that in preparation for the theft a car belonging to his coconspirator would be used and that his coconspirator was involved with rugs, and evidence that Gambale was a rug dealer. Viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1940), there was ample evidence from which a rational juror could conclude beyond a reasonable doubt that Gambale was guilty of the offenses with which he was charged.

We find no ground for reversal in the district court's refusal to allow Gambale to present witnesses to testify that FBI Special Agent Donald Winters, upon arresting Gambale, indicated his belief that Gambale did not meet the description provided by Mui of the man who had followed him and Marrale in Gambale's car after the theft. The proffered evidence was of little relevance and minimal probative value in light of the facts that (1) Winters had received Mui's description only second-hand at best, and in words that differed from those used by Mui, and (2) the jury had before it both Mui's actual description and Gambale's actual appearance. The trial judge's evaluation that the probative value of the evidence would be outweighed by the danger of confusing the issues or misleading the jury was not inappropriate. Fed. R. Evid. 403.

The court's admission into evidence of a "sonically enhanced" duplicate tape of Marrale's telephone conversation with Mui was not error. No question has been raised as to the authenticity of the original tape or as to the accuracy of the transcripts as prepared from either tape. The trial judge listened to both the original tape and the sonically enhanced duplicate tape and concluded that the duplicate did not contain conversation that was not on the original. His decision to allow the government to play

the duplicate for the jury was authorized by Fed. R. Evid. 1003.

We are likewise unpersuaded by Gambale's argument that he was "sandbagged" by the prosecutor's rebuttal summation. The defense summation had argued that Gambale's trip to Manhattan on the day money was delivered to Mui, for a purpose described by Gambale as the earning of $40 by transporting chairs, made the charge that Gambale had been a principal in a $2 million robbery entirely implausible. The prosecutor's rebuttal merely raised the possibility that Gambale's trip had a purpose other than the earning of $40, *i.e.*, that perhaps what was happening during the trip was that Gambale was collecting "laundered" money to be delivered to Mui. This rebuttal hypothesis, while not supported by direct evidence, did not ask the jury to draw an unfair inference. There was evidence that Gambale's trip to Manhattan was arranged only shortly after the meeting to deliver money to Mui was arranged; that Gambale had his employee wait in the van while he entered the chair factory alone and carried the chairs out himself despite a chronic back ailment, rather than having the employee help carry them from the factory; that Marrale's partner who was to launder the stolen money was Gambale; and that when Marrale entered Gambale's car just prior to going to deliver the money to Mui, surveillance revealed that Marrale was empty-handed whereas the same could not be said of Gambale. At the sentencing of Gambale, after a thorough review of the evidence, Judge Bramwell was of the view that the prosecution's hypothesis that the so-called $40 trip might have been a trip to collect laundered money was not unreasonable. We agree.

We have also considered Gambale's other contentions and find them meritless. The judgment of conviction is affirmed.

AMALYA L. KEARSE, U.S.C.J.
RICHARD J. CARDAMONE, U.S.C.J.
RALPH K. WINTER, U.S.C.J.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifth day of October, one thousand nine hundred and eighty-three.

No. 83-1109

UNITED STATES OF AMERICA,

Appellee,

v.

VINCENT GAMBALE,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, Vincent Gambale,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro,
Clerk

by Francis X. Gindhart,
Chief Deputy Clerk